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U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



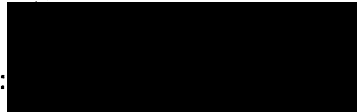
U.S. Citizenship  
and Immigration  
Services



FILE: WAC 93 005 52165 Office: CALIFORNIA SERVICE CENTER

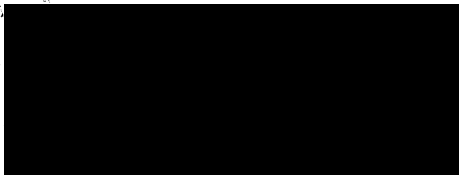
Date: NOV 29 2004

IN RE: Petitioner:  
Beneficiary:



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

*Robert P. Wiemann*

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a print shop. It seeks to employ the beneficiary permanently in the United States as a graphic designer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$26.55 per hour, which equals \$55,224 per year.

On the petition, the petitioner stated that it was established during 1998 and that it employs two workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Los Angeles, California.

In support of the petition, counsel submitted the 2001 joint Form 1040 U.S. Individual Income Tax Return of the petitioner's owner and owner's spouse, including a Schedule C showing the petitioner's profit for the year. The Schedule C shows that the petitioner returned a profit of \$64,897 during 2001. The Form 1040 shows that the petitioner's owner and owner's spouse declared an adjusted gross income of \$60,311 during that year, including all of the petitioner's profit reduced by deductions. That return also shows that the petitioner's owner and owner's spouse had two dependents during that year.

Counsel also submitted the petitioner's compiled financial statements for the six months ended on June 30, 2002. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on February 10, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date.

In response, counsel submitted an additional copy of the petitioner's owner's 2001 tax return.

On May 20, 2003 the Service Center requested, *inter alia*, additional evidence pertinent to the petitioner's ability to pay the proffered wage. The Service Center also noted that the petitioner is a sole proprietorship and requested a statement of the petitioner's owner's family's monthly expenses.

In response, counsel submitted a list of the petitioner's owner's family's recurring monthly expenses, a print-out of web content purporting to show the balance in a bank account belonging to the petitioner's owner, and a copy of the 2002 joint Form 1040 U.S. Individual Income Tax Return of the petitioner's owner and owner's spouse including the Schedule C showing the petitioner's performance for that year.

The petitioner's owner's family's budget states that the petitioner's owner, and presumably his wife and daughter as well, live in the his son's townhouse rent-free. The budget states that the petitioner's owner's expenses are approximately \$1,799 per month, or \$22,240 per year.<sup>1</sup>

The 2002 Schedule C shows that the petitioner returned ordinary income of \$28,392 during that year. The Form 1040 shows that the petitioner's owner and owner's spouse declared adjusted gross income of \$77,885 during that year, including all of the petitioner's profit. That tax return shows that the petitioner's owner and owner's spouse had one dependent during that year.

In a cover letter, dated August 5, 2003, counsel stated that the evidence shows the petitioner's ability to pay the proffered wage, stressing the petitioner's gross sales. Counsel also submitted evidence that Hong Y. Lee, whom the petitioner's owner and owner's spouse had claimed as a dependent the previous year, owns a condominium in Los Angeles.

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<sup>1</sup> The arithmetic in that statement, and elsewhere in the budget, although not perfectly accurate, is sufficiently close for the present purpose.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on August 21, 2003, denied the petition. The director noted that the petitioner's owner's adjusted gross income exceeded the proffered wage, but stated that to expect the petitioner's owner to support his family on the amount which would have remained after paying the proffered wage would be unreasonable.

On appeal, counsel argues that the director's decision is speculative. Counsel also argues that the director ignored evidence that the petitioner's owner lives with his son, thus reducing his expenses.

Counsel's reliance on the amounts allegedly in the petitioner's owner's bank account is misplaced. Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Further, bank statements show the amount in an account on a given date, and cannot generally show the sustainable ability to pay a proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner, however, is a sole proprietorship. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's income and assets are properly combined with those of the petitioner's owner in the determination of the petitioner's ability to pay the proffered wage. The petitioner's owner is obliged, however, to demonstrate that he could have paid the proffered wage out of his adjusted gross income and supported himself on the amount remaining.

The proffered wage is \$55,224 per year. The priority date is April 30, 2001.

During 2001 the petitioner's owner had adjusted gross income of \$60,311. If the petitioner's owner had been required to pay the proffered wage out of that amount, he would have been left with a balance of \$5,087. The petitioner's owner's budget indicates that he requires \$22,240<sup>2</sup> per year to support his family. The petitioner's owner's adjusted gross income during that year was insufficient, therefore, to pay the proffered wage and support the petitioner's owner's family. For the reasons enumerated above, the funds allegedly in the petitioner's owner's bank account cannot be used to show the ability to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001.

During 2002 the petitioner's owner had adjusted gross income of \$77,885. If the petitioner's owner had been required to pay the proffered wage out of that amount, he would have been left with a balance of \$22,661. The petitioner's owner's budget indicates that he requires \$22,240 per year to support his family. During that year, the petitioner's owner's adjusted gross income was sufficient, therefore, to pay the proffered wage and support the petitioner's family. The petitioner has shown the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

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<sup>2</sup> Although, as was noted above, the math on that budget is incorrect, the result would remain the same if it were corrected.